

O.R. 373. Nor can one of the public use a highway for the purpose of shooting game which strays or flies . . . the highway from the lands of the adjoining proprietor who owns the fee in the soil of the highway, *Harrison v. Rutland (Duke of)*, [1893] 1 Q.B. 142; and see *Hickman v. Maisey*, [1900] 1 Q.B. 752; *Reg. v. Pratt*, 4 E. & B. 860, 119 E.R. 319.

The right to kill game is somewhat affected by statute in Ontario. By R.S.O. (1887) c. 221, s. 10, it was provided that "in order to encourage persons who have heretofore imported or hereafter import different kinds of game, with the desire to breed and preserve the same on their own lands, it is enacted that it shall not be lawful to hunt, shoot, kill or destroy any such game without the consent of the owner of the property wherever the same may be bred." And a penalty was provided for breach of the Act. In an action by the owner of preserves for the value of deer which had strayed from the preserves upon the defendant's land and had there been killed by the defendant, the opinion was expressed that the Act was not intended to affect the common law right of the owner of any other land to kill and take any such game as might from time to time be found upon his land, and that the preserver of the deer had no right of action against the defendant, *Re Long Point Co. v. Anderson*, 19 O.R. 487; reversed on the ground that prohibition would not lie: 18 A.R. 401. In other words, the defendant acquired a temporary possessory property in the game as soon as it came upon his land. The result would seem to be, if this opinion is correct, that the penalty provided by the Act could not be enforced in a similar case, because to do so would be to exact a penalty from the defendant for killing his own deer. This would restrict the operation of the Act to hunting or killing game either on the preserved property or elsewhere than on the land of the person who kills it.

This enactment, somewhat modified, was continued in R.S.O. (1897) c. 287; and by R.S.O. (1914) c. 262, s. 22, it is now provided that (1) "where a person has put or bred any kind of game upon his own land for the purpose of breeding and preserving the same, no person, knowing it to be such game, shall hunt, shoot, kill or destroy it without the consent in writing of the owner of the land." (2) "This section shall not prevent any person from shooting, hunting, taking or killing upon his own land, or upon any land over which he has a right to shoot or hunt, any game which he does not know or has not reason to believe has been so put or bred by some other person upon his own land." And penalties are provided for infringement of the Act. By the express wording of this enactment, the common law right of the owner of land to kill game which he finds thereon is preserved, provided that he does not know or has not reason to believe that it is preserved game, and the expression of this right seems to predicate that if the landowner does know or has reason to believe that the game is preserved, he must not kill it on his own land.

There is nothing in this enactment to change or affect the character of the right to shoot or kill game. In other words, it still remains an incorporeal right, and should be created or assigned by deed, although the "consent in writing" of the owner of the land is all that is required by the Act. But a proper consent, if not under seal, would no doubt be treated as an agreement for a deed as before mentioned.